

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX -- SINGLEWIDE MANUFACTURED HOMES -- CHARGES FOR DIGGING FOOTERS OR PAD HOLES AND PLACING BLOCKS IN SAME CONSTITUTE CONTRACTING ACTIVITIES -- Petitioner's activities of digging pad or footer holes and thereafter placing concrete blocks therein constitute site preparation by constructing a foundation, as provided for in 110 C.S.R. 15, § 122.3.3, and, therefore, none of said activities are subject to the imposition of consumers' sales and service tax.

CONSUMERS' SALES AND SERVICE TAX -- SINGLEWIDE MANUFACTURED HOMES -- HOOK-UP AND CONNECTION CHARGES -- 110 C.S.R. 15, §§ 122.3.1 and 122.3.2, which require that certain hook-up and installation charges are deemed to be incidental to the sale of the mobile home apply only where a purchased home is attached or placed upon an existing foundation (holes for concrete blocks previously dug by prior owner or user of lot).

FINAL DECISION

The Field Auditing Division of the West Virginia State Tax Commissioner's Office conducted an audit of the books and records of the Petitioner. Thereafter, on December 19, 2003, the Director of this Division of the Commissioner's Office issued a consumers' sales and service tax assessment against the Petitioner. The assessment was for the period of January 1, 2000, through October 31, 2003, for tax, interest, and no additions to tax, for a total assessed liability. Written notice of this assessment was served on the Petitioner.

Thereafter, by mail postmarked February 16, 2004, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code § 11-10A-8(1) [2002].

Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002] § 121 C.S.R. 1, § 61.3.3 (Apr. 20, 2003).

FINDINGS OF FACT

1. Petitioner is a corporation having its principal office on the West Coast.
2. Petitioner has seven (7) retail stores in West Virginia, located in seven different areas (the “locations”).
3. Petitioner is affiliated with another corporation of the same name in another out-of-state location; said office serves as a field support center, including accounting and data processing, to the locations.
4. The locations are retail stores for single and multi-section manufactured homes, and Petitioner serves its customers in the purchasing, financing, and installation of such homes.
5. The purchase of a manufactured home from Petitioner is initiated when a representative of Petitioner completes and a customer signs a purchase contract, which contains, among other things, the customer name, address, model, serial number, year of the home purchase and the figure agreed upon between the retail store and the customer.
6. In manufacturing, selling and installing single-section and multi-sectional homes, Petitioner is required to comply with the various federal requirements imposed by the Housing and Urban Development Division of the United States Department of Labor (the “HUD”), the West Virginia Department of Labor (the “WVDOL”), the American National Standards Institute, Inc.’s American National Standard for Manufactured Home Installations (the “ANSI Manual”), and its own installation manual.
7. Its installation manual imposes standards required by the ANSI Manual for manufactured home installations, including certain national buildings codes.
8. During the audit period, Petitioner was a member of the West Virginia Manufactured Housing Association who on December 31, 2003, issued a letter to its members urging them to seek clarification from Respondent about what she deems to be the determining factor in deciding whether a particular activity constitutes “contracting,” for which consumers’ sales and service tax is not required to be collected by Petitioner from its customers.

9. To perform the audit, the Division reviewed documentation from September of 2002, which was the one-month sample period selected for review.

10. Among the documents reviewed by the Division was a spreadsheet prepared by Petitioner for the month of September, that identified, by location, the date of sale of a manufactured home, the customer, the serial number of the home, whether the home is a primary or secondary residence, the total sale price, the amount of any exemption claimed, the taxable sales price, the sales tax accrued and the sales tax due.

11. Results of the sample, consisting of six (6) invoices and selected by the Division in order to "save time," were then pro-rated to the entire audit period to arrive at the assessment.

12. All units in the sample period were single-section units because Respondent took the position that the digging of footers is considered contracting activity for multi-sectional homes due to the fact that in such cases concrete is poured.

13. The Division then applied a gross profit percentage of twenty (20) percent, calculated from Petitioner's tax returns for the years 2000, 2001 and 2003, and applied that percentage to the delivery and set-up charges contained in Petitioner's internal costing worksheet known as the Sales Data Entry Form in order to estimate the portion of the total sales price related to what Respondent considered were delivery and set-up charges.

14. Shortly thereafter, Petitioner requested from the Division a more detailed explanation of the reasons for the Assessment and by letter dated January 14, 2004 and addressed to Petitioner, the Division stated as follows:

During the audit period January 1, 2000 through October 31, 2003, inclusive, you erroneously under collected and under remitted consumers' sales and service tax due on all sales subject to tax. The assessment is due to your failure to collect 6% tax on mobile home installation charges, when installation was incidental to the sale of the mobile home. Per TSD 315, installation is incidental unless it includes contracting activities. For the audit sample period, September 2002, all sales were reviewed. The sample indicated that for all but one single wide home sale, installation was limited to digging footers and attaching the home to the foundation (concrete block). Digging footers and attaching the home to the foundation does not qualify as contracting. The installation was subject to the 6% consumers' sales and service tax. Due to your failure to separate installation charges, the taxable charges were estimated based on cost. The 6% taxable charges were reduced by the 3% tax you had collected. The sample period tax due was prorated over the entire period.

15. At the hearing, Petitioner's witness, who was a general manager at one of Petitioner's locations from 1998-2001 and was a district manager for the West Virginia operation from 2001 through the spring of 2004, testified that in his experience, the gross profit percentage approximates sixteen (16) percent.

16. For both new and used sales, delivery and set up charges were not separately stated because such charges were included in the sale price of the manufactured home; however, in setting that price, the costs to Petitioner for such delivery and set up charges are not marked up by Petitioner, only the whole cost of the home itself includes a mark-up.

17. The sample contained two (2) sales of used manufactured homes.

18. In the manufactured housing context, the term “support system,” means a combination of footings, piers, and shims that will, when properly installed, support the manufactured home.

19. In the manufactured housing context, “footers” or “footing” refers to that part of the support system that sits directly on the ground at, below, or partly below grade to support the piers.

20. Footings must be placed a minimum of four (4) inches below grade in undisturbed soil and must support every pier.

21. In the manufactured housing context, the term “pier” means that portion of the support system between the footing and the manufactured homes, exclusive of shims, examples of which include, but are not limited to manufactured steel stands, pressure-treated wood, manufactured concrete stands, and concrete blocks.

22. Footings can consist of concrete, pressure-treated permanent wood, or other materials approved by the ANSI Manual.

23. Acceptable concrete foots may consist of pre-cast or poured-in-place concrete pads, slabs, or ribbons at least 3 ½ inches thick, with a 28-day compressive strength of at least 3,000 pounds per square inch.

24. Respondent’s spreadsheet (Column D) totaling a certain amount and entitled “Untaxed Portion Subject to 6%,” represents the cost of footers for which no tax was charged.

25. On Respondent’s spreadsheet (Column E), totaling a certain amount and entitled “Untaxed Portion Subject to 3%,” represented installation charges for which Petitioner already collected a tax of 3%; to which Respondent added an additional 3%.

26. Petitioner makes the footer deduction on its West Virginia Sales Tax Worksheet because that cost is not considered by Petitioner to be part of the cost of the home.

27. In both multi-section and single-section manufactured homes, a hole is dug underneath the frost line; however, with multi-section homes, footers are constructed by pouring concrete into the hole and with single section homes, footers are constructed by inserting a solid four-inch concrete block into the hole.

28. The Petitioner’s witness testified that it was his opinion that site prep for mobile home includes the grating to divert any water away from the home, getting the site ready for the

home to come into the site, digging and pouring footings, foundation footings and getting ready to accept the manufactured home. Petitioner's witness further testified that in his opinion foundation work includes digging and pouring of footers, foundation footers, including the digging of footer holes used for singlewide sections because the home cannot be set without that being done.

DISCUSSION

The first issue to be decided is whether Petitioner has shown that installation charges on its singlewide homes which involve placing concrete blocks in excavated pad or footer holes should not have been assessed consumers' sales and service tax thereon because the same constituted the activity of contracting.

W. Va. Code § 11-15-2(s) provides that the term "service" or 'selected service' includes all nonprofessional activities engaged in for other persons for a consideration, which involve the rendering of a service as distinguished from the sale of tangible personal property, but shall not include contracting, personal services or the services rendered by an employee to his or her employer or any service rendered for resale." (emphasis added)

A person who performs contracting services is providing a nontaxable service and is not required to collect consumers' sales and service tax from his or her customers for those services.

Specifically, W. Va. Code § 11-15-2(b)(3)(A) provides that:

"Contracting" means and includes the furnishing of work, or both materials and work, for another (by a sole contractor, general contractor, prime contractor, subcontractor or construction manager) in fulfillment of a contract for the construction, alteration, repair, decoration or improvement of a new or existing building or structure, or any part thereof, or for removal or demolition of a building or structure, or any part thereof, or for the alteration, improvement or development of real property. Contracting also includes services provided by a construction manager so long as the project for which the construction manager provides the services results in a capital improvement to a building or structure or to real property.

W. Va. Code § 11-15-2(b)(3)(A) does limit the definition of contracting by providing that:

(vii) Contracting does not include the furnishing of work, or both material and work, in the nature of hookup, connection, installation or other services if the service is incidental to the retail sale of tangible personal property from the service provider's inventory: Provided, That the hookup, connection or installation of the foregoing is incidental to the sale of the same and performed by the seller thereof or performed in accordance with arrangements made by the seller thereof. Examples of transactions that are excluded from the definition of contracting pursuant to this subdivision include, but are not limited to, the sale of wall-to-wall carpeting and the installation of wall-to-wall carpeting, the sale, hookup and connection of mobile homes, window air conditioning units, dishwashers, clothing washing machines or dryers, other household appliance, drapery rods, window shades, Venetian blinds, canvas awnings, free-standing industrial or commercial equipment and other similar items of tangible personal property...

W. Va. Code § 11-15-2(c)(vii)(emphasis added).

Although all non-incidental contracting services associated with the sale of the mobile home are services excluded from the imposition of the sales tax, the statute does, however, place a sales tax of three (3%) percent on the mobile home itself, provided that the mobile home will be used as the customer's primary residence.

Specifically, the statute provides that “[n]otwithstanding any provision of this article to the contrary, after the thirty-first day of December, two thousand three, the tax levied on sales of mobile homes to be used by the owner thereof as his or her principal year-round residence and dwelling shall be an amount equal to six percent of fifty percent of the sales price.” W. Va. Code 11-15-3(f); See also W. Va. § 11-15-9(16) (providing an exemption from sales tax for “[s]ales of mobile homes to be used by purchasers as their principal year-round residence and dwelling: Provided, That these mobile homes are subject to tax at the three-percent rate”).

The applicable regulations concerning the above are as follows:

§ 122.3.1 Sales and Installation of Manufactured Home by Seller.

When a retail dealer of manufactured homes sells a manufactured home from his inventory and agrees to hook-up and connect the same, or to arrange for the hook-up and connection to be done by another, consumer's sales and use taxes are due on the gross proceeds which the retail dealer derives from the entire transaction. **By statute**, the hook-up and connection of a manufactured home is deemed to be incidental to the sale thereof when the retail dealer does the hook-up and connection or arranges for another person to do the hook-up and connection. [emphasis added]

122.3.2 Activities which are included in the phrase "hook-up or connection" include, but are not necessarily limited to, the hooking-up of utility lines, the blocking up of the home, the underskirting of the home, **attaching** the home to the foundation, the finishing of interior trim, the joining together of modules or sections, or mere delivery of the home to the site. [emphasis added]

122.3.3 If the vendor of the home, or another whose work is arranged for by the vendor, prepares the site for the home by constructing a foundation for the home or by installing utility lines to the site or doing other contracting activity, the hook-up and connection of the home are no longer incidental to the sale of the manufactured home. Under these circumstances, the vendor should charge consumer sales and use taxes on only the sales price of the mobile home. Consumers' sales and use taxes should not be charged on the contracting service. For example, the sales price of a manufactured a home is \$20,000.00. The vendor prepares the site at a cost of \$5,000.00. The

sales price of the home is subject to consumers' sales and use tax. Site preparation, which is classified as contracting, is not taxable; but the materials purchases for use or consumption in the contracting activity would be taxable to the contractor at the time of purchase. [emphasis added]

122.3.3.1 The special rule provided in Section 122.3.3 is contrary to the general rule that when materials are provided as part of a contract for contracting services the contractor is deemed to be the consumer or user of all the material used or consumed in the contract and must pay consumers' sales and use taxes on the purchase price of such items. If the general rule were to be applied, the contractor would pay tax on the purchase price of the manufactured home at the rate of six percent (6%) even though, the contract might be with a person who will utilize the manufactured home as such person's principal year-round residence and dwelling. In order to preserve the benefit of the lower consumers' sales and use tax for such a persons, this special rule is provided.

122.3.3.2 This special rule shall have no effect on the general rule; and if the general rule is successfully challenged because of this special rule, the special rule must be set aside.

122.3.3.3 Charges for activities which are incidental to the sale as a manufactured home are taxable at the rate of six percent (6%), regardless of the anticipated use of the home. To illustrate, a manufactured home costs \$20,000. The vendor agrees to deliver, hook-up and connect the home at the customers' site for \$2,000. Because the purchaser will use the manufactured

home as his principal year-round residence and give the vendor a certificate to that effect, the \$20,000 charge for the manufactured home is taxed at three percent (3%). The \$2,000 charge is taxed at six percent (6%).

Respondent's counsel has directed this tribunal to a published decision issued by the former Office of Hearings and Appeals dated November 30, 2001, Docket No. 99-137C, wherein it was held in Synopsis Point 1: "Installation charges received by a mobile home dealer incidental to its sales of singlewides are properly subject to the consumers' sales and service tax, C.S.R. 110-15-122.3.2. The activity of digging of footers and attaching mobile home to the foundation by the mobile home dealer does not constitute 'contracting activity' so as to be exempt from the consumers' sales and services tax."

In the 2001 decision that Petitioner's counsel argued unsuccessfully that installation activity incidental to its sales of singlewides constituted contracting because footers had to be dug for both singlewides and doublewides. No attempt was made by the taxpayer in that matter to argue the inapplicability of the language of C.S.R. 110-15-122.3.2 that as a retail dealer its charges for hook-up or connection, including the attaching of the home to the foundation, was not contracting but, rather, incidental installation, and, therefore, all charges were subject to consumers' sales and services tax.

While the decisions of the former Office of Hearings and Appeals are persuasive, this tribunal is not bound by those decisions. We believe that the 2001 decision of the former Office of Hearings and Appeals does not properly distinguish between merely attaching a manufactured home to a foundation and constructing a foundation for subsequent attachment of the manufactured home to the constructed foundation.

In this case Petitioner's counsel has successfully argued that C.S.R. 110-15-122.3.3 is really the controlling regulation, because what we have here is "site preparation," which constitutes contracting, and none of that is "incidental" to the sale of the manufactured home. Digging of footers clearly falls with the ordinary definition of "constructing" a foundation.

Accordingly, it is DETERMINED that the activities of digging pad or footer holes and thereafter placing concrete blocks therein constitute site preparation by constructing a foundation, as provided for in 110 C.S.R. 15, § 122.3.3, and, therefore, none of said activities are subject to consumers' sales and service tax.

It should be noted that it is the further determination of this tribunal that 110 C.S.R. 15, §§ 122.3.1 and 122.3.2 apply only where the purchased manufactured home is attached or placed upon an existing foundation (holes for concrete blocks previously dug by prior owner or user of the lot).

It is also noted that the contractor preparing the site for the manufactured home by constructing a foundation (including digging footers) is liable for purchaser's use tax on materials and supplies used or consumed in the site preparation.

This tribunal also concludes, as to the second issue to be decided, that Petitioner did make a compelling case that the sampling and projection method used by the Respondent in conducting the audit did not produce a reasonable result. Specifically, too few invoices were relied upon over a three-year period and the gross profit percentage of twenty (20%) percent should have been lower based upon the testimony presented at the hearing by Petitioner's witness.

CONCLUSIONS OF LAW

Based upon all of the above it is **DETERMINED** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that the assessment is incorrect.

See W. Va. Code § 11-10A-10(e) (2002) § 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

2. The Petitioner has satisfied its burden of proving that foundation construction work consisting of digging footers and pad holes and thereafter placing concrete blocks in said holes constitute the nontaxable activity of site preparation and, therefore, nontaxable contracting services.

3. Petitioner also carried the burden of proof with respect to its argument that Respondent's sampling and projection method used in conducting to audit did not produce a reasonable result, including possibly inflating the gross profit percentage.

DIRECTIVES RESPECTING COMPUTATION OF THE AMOUNT OF TAX DUE

1. In accordance with 121 C.S.R. 1, § 73.1.1, the above shall constitute a statement of the opinion of the West Virginia Office of Tax Appeals determining the issues in the above-captioned matter;
2. The West Virginia Office of Tax Appeals is withholding entry of its decision for the purpose of requiring the parties to submit computations of the tax due and owing consistent with the opinions set forth above;
3. Within thirty (30) days of service of this Final Decision on the Legal Issues, the parties shall meet with an attempt to reach an agreement

with respect to the computation of tax due in accordance with the above-stated Division;

4. If the parties are unable to agree upon an amount of tax due, then in accordance with the provisions of 121 C.S.R. 1, § 73.2.1, and within forty-five (45) days of service of this Decision, either party may submit a computation of the amount of tax that it believes is due, and serve its computation on the West Virginia Office of Tax Appeals and on the other party;
5. If only one party submits a computation of the amount of tax it believes is due, the Office of Tax Appeals shall proceed in accordance with the provisions of 121 C.S.R. 1, § 73.2.2;
6. If both parties submit a computation of the amount of tax they believe is due, either in accordance with the provisions of 121 C.S.R. 1, § 73.2.1 (where both parties file their own computations simultaneously) or 121 C.S.R. 1 § 73.2.2 (where one party files its computation and the other party files its computation in response). The Office of Tax Appeals shall proceed in accordance with the provisions of 121 C.S.R. 1, § 73.2.3;
7. If after the submission of computations of the amount of tax due by both parties, either party believes that an evidentiary hearing is necessary, within ten (10) days of receipt of the opposing party's computation, it shall submit a request for an evidentiary hearing, clearly and succinctly setting forth the grounds upon which its

request is bases, and describing the nature of any evidence that it intends to introduce.

Upon receipt of an agreed upon computation of tax due, pursuant to 121 C.S.R. 1, § 73.1.2, or upon resolution of any dispute in the computations of tax due submitted by the parties, pursuant to 1221 C.S.R. 1, § 73.2.1 & 2, the West Virginia Office of Tax Appeals will enter its computation of tax due.